

ADMINISTRATIVE APPEAL DECISION

CLAYTON MEYERS; FILE NO. 2005-00609(0)

BUFFALO DISTRICT

3 OCTOBER 2007

Review Officer: James E. Gilmore, U.S. Army Corps of Engineers, Southwestern Division

Appellant: Mr. Clayton Meyers

Jurisdiction: Section 404 of the Clean Water Act (33 U.S.C. 1344)

Appeal Meeting and Site Visit Date:

Background Information: Prior to the US Army Corps of Engineers, Buffalo District (District) completing its approved jurisdiction determination on the appellant's estimated 12-acre woodlot, the Natural Resources Conservation Service (NRCS) had completed two wetland determinations for the owners of the property. These determinations were completed in April 1997 and November 2004, respectively. The NRCS, using methodology contained in the 1987 Corps of Engineers Wetlands Delineation Manual (1987 Manual), determined that the appellant's property contained wetlands that were subject to the Clean Water Act (CWA) and the Food Security Act (FSA). Mr. Meyers does not agree with the NRCS wetland determinations and requested that the Corps of Engineers perform a wetland determination on his property. The appellant's property is located south of Township Road 36 (St. Johns Road) in Jackson Township, Seneca County, Ohio.

The Departments of the Army (Corps of Engineers), Agriculture and Interior and the Environmental Protection Agency entered into a Memorandum of Agreement in 1994 (1994 MOA). The purpose of the 1994 MOA was to specify the manner in which wetland delineations (determinations) and other determinations of waters of the United States made by the Department of Agriculture's NRCS would be relied upon for purposes of the CWA and the FSA. Both federal agencies make wetland determinations for the laws that each agency is responsible to enforce. The 1994 MOA authorized the NRCS to make wetland determinations on agriculture lands and/or lands owned by a USDA participant for purposes of determining compliance with the CWA. Accordingly, NRCS staff performed wetland determinations using the protocol established in the FSA when making wetland determinations on agricultural lands and used the 1987 Manual when performing wetland determinations on non-agricultural lands. The MOA allowed the two agencies to rely on each other's determinations to the maximum extent permissible by current statutes and regulations by emphasizing that the NRCS and Corps of Engineers ("Corps") would generally rely on each other's determinations.

By letters dated 18 and 24 January 2005, the NRCS and Corps withdrew from the 1994 Interagency Memorandum of Agreement Regarding the Delineation of Wetlands for Purposes of the Section 404 CWA and FSA. Interagency joint guidance published by the NRCS and the Corps in February 2005 cited “[current differences] between CWA and FSA on the jurisdictional status of certain wetland..., it is frequently impossible for one lead agency to make determinations that are valid for the administration of both laws.”

On September 21, 2005, the District performed a site inspection with representatives of the appellant. Based on this site visit, the District concluded that the woodlot contained wetland areas that are subject to the Corps jurisdiction under Section 404 of the CWA.

On October 17, 2005, the District issued an approved jurisdictional determination (JD) to the appellant, stating that the woodlot met the criteria to be identified as a water of the U.S. The District stated that its JD was based upon its September 21, 2005 site visit.

The appellant disagrees that the woodlot is a water of the U.S. and submitted his Request for Appeal (RFA) dated December 1, 2005.

Summary of Decision: The District’s administrative record supports its decision that according to the 1987 Manual, wetlands are present on the appellant’s property and the appellant’s reasons for appeal do not have merit for the reasons discussed below. However, since the time of their decision, the U.S. Supreme Court issued a June 19, 2006 decision in *Rapanos v. United States*, ___ U.S. ___, 126 S.Ct. 2208, (2006), that addressed the scope of the Corps’ regulatory jurisdiction under Section 404 of the Clean Water Act (CWA). Therefore, the District is instructed to reconsider their JD decision in light of the Rapanos decision.

Appeal Decision Evaluation, Findings and Instructions to the Buffalo District Engineer (DE):

Under Section II of the Notification of Administrative Appeal Options and Process and Request for Appeal form, the appellant’s stated reason for appeal is “[t]he reviewed area consists entirely of uplands per attached sheets.” The attached sheet of supporting information contained seven paragraph statements. The paragraph statements will be addressed in this decision document as individual reasons for appeal.

Reason 1: The Corp accepts and uses incorrect data from the 1997 NRCS wetland determination (and re-confirmed by the NRCS in November 2004) to determine that the woodlot is a mosaic of micro topography changes that contains wetland habitats. The man-made mound was removed by Ron Hovis in September, 1999 to let the water out. This changed the hydrology indicators from the 1997 NRCS wetland determination. Primary and secondary hydrology indicators were not proven during the post Katrina September 21, 2005 site visit. Any puddles formed from rain do not last long enough to meet the consecutive day saturation requirements during the growing season to be a primary indicator of hydrology.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The appellant contends that the required hydrology criterion does not exist on the site.

Based on a review of the District's administrative record for this action, the District conducted two independent JDs on the appellant's property. The first determination was preliminary and completed by performing a review of office resources. The first determination was completed on March 11, 2005 for Mr. Ned Gregg. Mr. Gregg is an auctioneer who contacted the District regarding a wetland determination for a woodlot that the owner wanted to sell. After reviewing the information provided by Mr. Gregg, the District staff realized the property in question belonged to the appellant's family. Mr. Gregg was contacted by telephone and informed that the NRCS had completed two wetland determinations on the property in 1997 and 2004 and that the NRCS had determined that the site contained areas that are subject to Section 404 of the CWA. The District followed up the telephone conversation with a preliminary determination letter dated March 11, 2005. In that letter, the District stated that it had completed a preliminary review of the information received from Mr. Gregg and that "[a]n office resource review was conducted, and the findings of that review suggest that the project is located in area that may be regulated by the Corps of Engineers and that a Department of the Army permit may be required for some or all of your project." The preliminary determination was completed using the steps outlined in the 1987 Manual.

The second determination was a field determination conducted by District staff on September 21, 2005. This determination was completed using the procedures outlined in the 1987 Manual¹. Pursuant to these procedures, the District determined that the woodlot contained areas that met the three criteria to be identified as wetlands. As discussed in this and following reasons for appeal, the District adequately supported this

¹ Corps policy (Head Quarters, U.S. Army Corps of Engineers, 27 August 1991) mandates the use of the 1987 Manual to identify and delineate wetlands potentially subject to regulation under Section 404 of the CWA. According to the 1987 Manual, a minimum of one positive wetland indicator from each parameter (soil, hydrology and vegetation) must normally be documented in order to make a positive wetland determination.

determination by documenting that the wetland areas were dominated by hydrophytic vegetation, hydric soils and met the hydrology criterion.

To support its findings that the hydrology criterion exist on the site, the District documented primary and secondary indicators of hydrology as required by the 1987 Manual. Primary wetland hydrology indicators identified on the site by the District were (1) water marks and (2) sediment deposits. In addition to finding two primary wetland hydrology indicators, the District also documented the existence of two or more secondary wetland hydrology indicators: (1) oxidized root channels in the upper 12 inches; (2) water stained leaves and (3) the FAC neutral test². Therefore, the District adequately documented that the hydrology criterion exists on the site and this reason for appeal does not have merit.

Reason 2: The district incorrectly applied May 6, 1995 Aerial Photographs for this jurisdictional determination for two reasons. There is a 30% chance to have more than 4.07 inches in April; April, 1995 had 5.20 inches of precipitation followed by May with above average precipitation so May 6, 1995 is much wetter than average. In addition, the man-made mound was not removed until September, 1999. For accuracy, Aerial Photograph used must be after September, 1999.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The District's administrative record shows that it followed the steps outlined in the Corps 1987 Manual in completing its jurisdictional determination of the appellant's property. The use of the 1995 aerial photograph along with other photographs, maps and documents is consistent with Part IV: Methods, Section B. Preliminary Data Gathering and Synthesis, Paragraph 55, Step 8 – Summarize Available Hydrology Data. This section of the 1987 Manual describes the type of information that should be reviewed prior to completing a jurisdictional determination. As previously stated, the District perform an on site determination to determine if the woodlot contained areas that met the three criteria to be identified as a wetland. The 1995 aerial photograph and other information were used to supplement the District's onsite findings and was not the primary source for identifying the hydrology criterion on the site.

The District also documented that they addressed and considered the removal of the mound after 1999 in their site notes as follows:

...the Meyers explained that they removed a portion of the woodlot in order to remove what they reference as an "earthen dike" filled with fence posts and fencing. They stated that the removal of this dike has allowed their woodlot to drain. During the September 2005 site visit the area in which the "earthen dike" had been removed consisted [of] an approximate 40 foot mowed area that

² Two are more secondary wetland hydrology indicators are required to be present before the wetland hydrology criteria is met, if primary indicators are not found on the site.

extended between the ditch and the woodlot. This mowed portion of the property contained areas of mowed sedges, and stretches of vegetation that contained sediment deposits and water stains that extended between wetlands observed in the eastern edge of the woodlot to the creek.

Based on the District's documentation and professional judgment, the removal of the mound appears too irrelevant and the District adequately documented the JD based on conditions that developed after the mound was removed. Therefore, this reason for appeal does not have merit.

Reason 3: The district did not consider certain relevant data regarding ground water levels. USGS Ground-water level data is attached for three sites that may be connected to Muddy Creek. Using the May, 1986 water level below the surface measurement, it is estimated that the ground water for the woodlot would have been about nine (9) feet below the surface relative to the 720 foot msl contour extending through the southeast corner of the woodlot. The year 1986 had above average precipitation.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The 1987 Manual does not require ground water to be the primary source of hydrology when determining if the hydrology criterion is met on a site. As previously discussed in appeal reason 1, the District adequately supports its findings that the hydrology criterion exist on the site by documenting primary and secondary indicators of hydrology as required by the 1987 Manual. Primary wetland hydrology indicators identified on the site by the District were (1) water marks and (2) sediment deposits. In addition to finding two primary wetland hydrology indicators, the District also documented the existence of two or more secondary wetland hydrology indicators: (1) oxidized root channels in the upper 12 inches; (2) water stained leaves and (3) the FAC neutral test. Therefore, this reason for appeal does not have merit.

Reason 4: The district incorrectly applied the premise of the 1987 US Army Corps of Engineers Wetland Delineation Manual. The premise states, “Many plant species can grow successfully in both wetlands and nonwetlands, and hydrophytic vegetation and hydric soils may persist for decades following alteration of hydrology that will render an area a nonwetland.” The woodlot is near the southern boundary of what was the Great Black Swamp. Humans altered the hydrology and lowered the water table significantly. The technical error seems to be an over-reliance on vegetation (a false positive in this case) and hydric soils to imply hydrology is also met.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: According to the 1987 Manual, in order to meet the hydrophytic vegetation criterion, more than 50 percent of the dominant species must be obligate (OBL) wetland plants, facultative wetland (FACW) plants or facultative (FAC) plants³. The District completed data forms for each of the sample sites tested on the appellant’s property. Two of the sites met the 1987 Manual criteria to be identified as wetlands. For these sites, the District documented that: the dominate vegetation was hydrophytic; the soil met the criteria to be identified as hydric; and the presence of primary and secondary indicators of wetland hydrology. In this case the dominant plants were either designated OBL or FACW, which indicates the soil is wet long enough to support hydrophytic vegetation. There is sufficient documentation in the administrative record to show that the District followed all required regulations, guidance and policies when it determined that the appellant’s property contained areas that met the three mandatory criteria – hydrophytic vegetation, hydrology and hydric soils - to be identified as a wetland. Therefore, this reason for appeal does not have merit.

Reason 5: The district did not consider certain relevant data from the figures 1,3 and 4 attached that were part of a 1999 Blueprint to provide guidance to the US Army Corps of Engineers. By extrapolating figure 3 data to the available digitized data in figure 4 it is apparent that hydric soils and non-hydric soil with hydric inclusions persist in nonwetland.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: Although there is no documentation in the administrative record that the District reviewed or did not review the information referenced by Mr. Meyers, there is sufficient documentation to support that the District did adhere to the procedures outlined in the Corps 1987 Manual and any guidance or policies issued regarding the use of the

³ Obligate Wetland plants are plants that occur almost always (99%) in wetlands under natural conditions, Facultative Wetland plants are plants that usually occur (>67% - 99%) in wetlands, Facultative plants with a similar likelihood (33% to 67%) of occurring in both wetlands and nonwetlands.

1987 Manual. The "Basis for Jurisdiction" form indicates that the District reviewed US Geological maps, the USDA soil survey for Seneca County, and National Wetland Inventory maps in addition to performing an onsite determination of the woodlot before completing its approved jurisdictional determination. This reason for appeal does not have merit.

Reason 6: The district did not consider certain relevant data from the National Academies published report, *Wetlands: Characteristics and Boundaries* (1995) to discern if wetlands exist. In the transitional and marginal areas essential characteristics must be weighed including hydrological features and the presence of organisms. There is no presence of salamanders, frogs, toads, turtles and snakes to indicate wetland habitats exist per Indiana Biology Technical Note No. 1. The presence of burrowing ground hogs (woodchucks), cottontail rabbits, red fox, opossum, chipmunks, field mice and possibly moles indicate that the woodlot is upland and the soil is not saturated by ground water or surface water.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: According to Corps policy (Head Quarters, U.S. Army Corps of Engineers, 27 August 1991), the 1987 Manual is the current Federal delineation manual used in the identification and delineation of wetlands and its use is mandatory. It also needs to be noted that the 1987 Manual continues to be clarified and updated through guidance documents and memoranda from the Corps Headquarters. This reason for appeal does not have merit.

Reason 7: This is similar to the phrase "innocent until proven guilty". Unfortunately the government has taken the position that a woodlot is a wetland until the property owner can prove it to be a nonwetland. The technical error regarding how the premise of the manual is being applied by the Corp and NRCS may impact numerous wetland determinations made over the years in the area.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: There is sufficient documentation in the Districts administrative record to support its findings that the appellant's woodlot contains areas that meets the criteria to be identified as a wetland per the 1987 Manual. Once the District established that wetlands existed within the woodlot, it had to determine if these wetlands were subject to interstate commerce and therefore a water of the U.S.

At the time of their decision, the controlling case law was represented by the January 9, 2001 decision of the U.S. Supreme Court in *Solid Waste Agency of Northern Cook County v. The U.S. Army Corps of Engineers*, 121 S. Ct. 675 ("SWANCC").

In the *SWANCC* decision, the Supreme Court held that the Corps exceeded its statutory authority by asserting Clean Water Act (CWA) jurisdiction over a wetland that provided migratory bird habitat. The Court's holding was narrowly limited to invalidating the so-called "Migratory Bird Rule." Thus, any waters that are non-navigable, isolated, and intrastate where the sole basis for jurisdiction is habitat for migratory birds are not regulated under the CWA. Furthermore, in *SWANCC*, the Court refused to overrule the holding in *United States v. Riverside-Bayview Homes, Inc.*, 474 U.S. 121 (1985) that traditionally navigable waters, all interstate waters, their tributaries, and adjacent wetlands are still considered "waters of the United States." Furthermore, in *United States v. Riverside-Bayview Homes, Inc.*, the Court gave significant deference to the Corps' technical expertise by stating "... the Corps ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for legal judgment that adjacent wetlands may be defined as waters under the Act" (*Id.* at 134).

A Joint Memorandum (Memo) published by the U.S. Environmental Protection Agency and the Corps, dated January 15, 2003 concludes in Section "A" that "[f]ield staff should continue to assert jurisdiction over traditional navigable waters (and adjacent wetlands) and, generally speaking, their tributary systems (and adjacent wetlands)."

In its administrative record, the District documents its findings from its September 2005 site visit. In its site notes, the District documents that the entire site is generally flat and the woodlot is situated in close proximity to Muddy Creek, a water of the U.S., and its tributaries.

The District documented that the wetlands in the western portion of the woodlot are separated from Muddy Creek by approximately 30 feet of side cast material from channeling activities within the creek.

The District also documented field indicators (sediment deposits and water stains) that wetlands in the eastern portion of the woodlot drained into the drainage ditch to the east of the woodlot. The District documented that this drainage ditch flows north and empties into a roadside drainage ditch along Township road 36 (TR 36). The District documented that the TR 36 roadside ditch flows into the Muddy Creek.

The District found, based on the proximity of the woodlot to Muddy Creek and its tributaries, that the wetlands met the definition to be identified as adjacent and therefore subject to the Corps jurisdiction. Based on the documentation contained in the administrative record, the District's JD was reasonable, consistent with law, and followed Corps policy *at the time of their decision*. Therefore, this reason for appeal does not have merit.

However, since the time of the District's decision, the U.S. Supreme Court issued a June 19, 2006 decision in *Rapanos v. United States*, ___ U.S. ___, 126 S.Ct. 2208, (2006) ("Rapanos"), that addressed the scope of the Corps' regulatory jurisdiction under

Section 404 of the Clean Water Act (CWA). The Court considered jurisdiction over certain waters, including intermittent and ephemeral waters and wetlands. On June 5, 2007, Corps and USEPA released national, joint guidance to foster consistent implementation of CWA JDs in light of Rapanos (“Rapanos Guidance”). The Rapanos Guidance consists of a guidance document, coordination memorandum, a JD form, and a JD form instructional guidebook.

The Rapanos Guidance directs the Districts to continue to assert jurisdiction over traditional navigable waters (TNWs) and all wetlands adjacent to TNWs. The Rapanos Guidance also generally allows for Districts to assert jurisdiction over waters, including wetlands that are not TNWs by meeting one of two standards articulated by the U.S. Supreme Court decision. These standards recognize regulatory jurisdiction over:

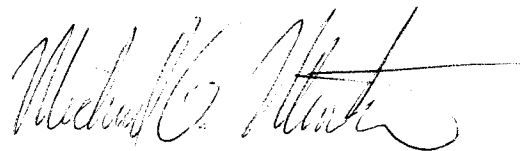
1) a water body that is not a TNW if that water body is “relatively permanent” and over wetlands adjacent to such water bodies if the wetlands “directly abut” the water body

and

2) tributaries that are not relatively permanent and their adjacent wetlands where the existence of a significant nexus has been determined. Generally, a significant nexus may be found where waters, including their adjacent wetlands, affect the chemical, physical or biological integrity of TNWs.

Therefore, and based upon the Rapanos decision and subsequent guidance, this decision is remanded to the District to undertake any necessary data collection and analysis and to re-evaluate and document its final decision consistent with the Rapanos Guidance.

Conclusion: I find that the District’s administrative record supports its decision that per the 1987 Manual, wetlands are present on the appellant’s property and the associated reasons for appeal do not have merit. However, based upon the Rapanos decision and subsequent guidance, this decision is remanded to the District to undertake any necessary data collection and analysis and to re-evaluate and document its final decision consistent with the Rapanos Guidance.



Michael Montone
Appeal Review Officer
Great Lakes and Ohio River Division